Case Nos. 82-6203

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term

* * * *

ALEX WAKEMAN, WALTER TEN FINGERS, Appellants,

v.

STATE OF SOUTH DAKOTA, Appellee.

* * * *

On Appeal from the

Supreme Court of South Dakota

* * * *

JOINT JURISDICTIONAL STATEMENT

* * * *

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QUESTIONS PRESENTED BY APPEAL

I. Is the state open fire statute invalid as repugnant to the First Amendment to the United States Constitution where the statute as applied by the Appellee State of South Dakota prohibited Lakota Indian Appellants from using traditional open pit ceremonial fires for Lakota religious purposes?

II. Is the prohibition by the state open fire statute as applied by the Appellee State of South Dakota of Lakota Indian Appellants' use of traditional open pit ceremonial fires for Lakota religious purposes preempted by the 1868 Ft. Laramie Treaty, 15 Stat. 635, and therefore invalid as repugnant to said Treaty and Article VI, Clause 2, of the United States Constitution?

III. Is the prohibition by the state open fire statute as applied by the Appellee State of South Dakota of Lakota Indian Appellants' use of traditional open pit ceremonial fires for Lakota religious purposes preempted by the fire regulations of the United States Forest Service, 36 C.F.R. Part 261, and therefore invalid as repugnant to said Federal regulations and Article VI, Clause 2, of the United States Constitution?

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REPORTS OF OPINIONS BELOW

The official report of the opinion of the Supreme Court of South Dakota in this matter below is South Dakota v. Dewey Brave Heart, et al., Nos. 13656 and 13655, 326 N.W.2d 220 (1982).

The opinion of the trial court in this matter below is found in thr trial transcripts of South Dakota v. Walter Ten Fingers and South Dakota v. Alex Wakeman, Seventh Judicial Circuit, Custer County, South Dakota, dated December 18, 1981.

JURISDICTIONAL GROUNDS

This proceeding is a direct appeal from a decision of the Supreme Court of South Dakota entered on November 10, 1982. The Notice of Appeal herein was filed on February 8, 1983, with the Clerk of the Supreme Court of South Dakota and with the Clerk of the Circuit Court of the Seventh Jucidial Circuit, Custer County, South Dakota. Jurisdiction of this appeal is conferred upon the United States Supreme Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS INVOLVED

The following Constitutional provisions, treaties, statutes, and regulations are involved in this appeal. Their pertinent text, because of thier length, are set forth in the Appendix.

United States Constitution, Article VI, Clause 2
(The Supremacy Clause)

United States Constitution, First Amendment

15 Stat. 635, Act of April 29, 1868
(The Fort Laramie Treaty of 1868)

19 Stat. 254, Act of 1877

16 U.S.C. §551

S.D.C.L. §34-35-16

S.D.C.L. §34-35-17

36 C.F.R. Part 261

STATEMENT OF THE CASE

Appellants are members of the Lakota Tribe of Indians (otherwise known as the Oglala Sioux Tribe) from the Pine Ridge Indian Reservation in South Dakota. Each Appellant practices the "Lakota tradition", a religious way of life, which includes the development of a spiritual understanding and relationship with Tunkashila Wakan-Tanka (the Great Spirit, the Creator) through the practice of various ceremonies centered around the Sacred Pipe. A sacred, "natural", fire is an essential, integral, part of each ceremony. Appellants purify themselves in the sweat lodge ceremony through prayer and steam produced by white hot stones which have been heated in an open pit fire. In the Sacred Pipe ceremony, Appellants sit and pray with other participants around a sacred, natural, open pit fire (which represents the center of the Lakota universe) from which a coal is taken to light the Sacred Pipe used in the ceremony. According to Lakota tradition, a separate, natural, open pit fire is used to prepare the food offered to the Lakota ancestral spirits and eaten in the traditional celebration or religious "feast" which follows each Pipe ceremony.

In early November, 1981, under the vision and guidance of a nationally and tribally recognized Lakota religious advisor, Appellants with other traditional Lakota persons established a spiritual encampment (known hereinafter as the "Camp") on land possessed and controlled by the United States Forest Service and within the boundaries of the Black Hills National Forest, the 1868 Ft. Laramie Treaty, 15 Stat. 635, and the State of South Dakota. The Camp was organized, erected, and conducted according to the strict requirements of Lakota tradition and included daily use of open pit fires by Camp members for sweat lodge ceremonies, Sacred Pipe ceremonies, and religious feasts. The fires, being sacred to Camp members, were constantly —

monitored, well-tended, and all in pits with flamable material removed. None of the fires had escaped any of the pits or posed any danger to the forest. During the period of the encampment, the United States Forest Service conducted an occasionally unmonitored "controlled burn" of the forest in the immediate vicinity of the Camp.

On several occasions prior to November 15, 1981, the Camp was visited by federal and/or state law enforcement authorities and Camp members were told to apply for a permit for open fires. On November 12, 1981, a Camp representative applied in person to the United States Forest Service District Ranger for a permit to build fires to be used "...in the practice of the Lakota Religion." The District Ranger, acting under state law, SDCL Chapter 34-35, pursuant to to a Cooperative Fire Control Agreement between the Black Hills National Forest Supervisor and the South Dakota Director of Forestry, denied the permit request citing as his reasons the "current weather conditions" and the vagueness of the request. He made no attempt with the Camp representative to obtain more information, clarify the request, mention any lawful alternatives to open fires, or consider issuing the permit with appropriate conditions.

On November 15, 1981, various state and county law enforcement authorities raided the Camp, arrested everyone present, including Appellants, for violations of the South Dakota open fire statute, SDCL §34-35-16, and dismantled and removed everything at the Camp.

At the pretrial motions hearing, Appellants and the other defendants moved to dismiss the charges on the ground that the United States Forest Service fire regulations, 36 C.F.R. Part 261, preempted state enforcement of the state open fire statute in this situation. The trial court denied the motion without

comment. Appellants and the other defendants then moved at the close of their defense to dismiss the charges on the grounds that the state open fire statute as applied was invalid as repugnant to the protection of the free exercise of their religion found in the First Amendment to the United States Constition and to the rights guaranteed to them by the 1868 Ft. Laramie Treaty, supra. In ruling upon these motions, the trial court specifically found that there was "...no doubt in [its] mind, that this particular Camp, this location, was a non-violent, peaceful Camp [of] spiritual significance to the participants." However, the trial court, believing that it lacked subject matter jurisdiction, refused to rule on the First Amendment issue by reasoning that the issue had to be raised through an appeal in federal court by Appellants and the other defendants. The court further refused to hear the treaty issue, again believing that it lacked subject matter jurisdiction by reason of the pending Court of Claims appeal of United States v. Sioux Nation of Indians, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed. 2d 844 (1980).

On December 10, 1981, the trial court entered judgment against each of the defendants including Appellants, finding them guilty of the misdemeanor of open fire and fined each the amount of $50.00.

The judgments were appealed to the Supreme Court of South Dakota on December 24, 1981. Each of the aforesaid issues were again raised before that Court. On November 10, 1982, the South Dakota Supreme Court ruled: that the state open fire statute was not preempted by federal law because any conflicts were resolved by another Forest Service regulation, 36 C.F.R. §211.3 and by the aforementioned Cooperative Fire Control Agreement; that subject matter jurisdiction to hear Indian treaty arguments of any kind lay solely with the United States Court of Claims; and that,

although it was proven that "...a purpose of the Camp was to attain spiritual growth and fulfillment", the Appellants and the other defendants had failed to meet their initial burder of showing the enforcement of the statute "in fact" denied them free exercise of their religion because they had not made any showing that their traditional Lakota religious ceremonies could not have been performed through the use of any other alternative. Brave Heart v. South Dakota, S.D., 326 N.W.2d 220 (1982).

STATEMENT OF REASONS FOR PLENARY CONSIDERATION

First Amendment Issue

The above-mentioned decision by the South Dakota Supreme Court is in direct opposition to the only other known decision regarding the First Amendment protection of Indian religious ceremonies from prohibition by a general state permitting statute. See, Frank v. State, Alaska, 604 P.2d 1068 (1979). It is believed to be a matter of first impression for the United States Supreme Court. In Frank, the Alaska Supreme Court found the state's moose hunting statute invalid as applied to the traditional hunting and use of moose meat in the religious feast following potlach (burial) ceremonies by Alaskan Indians as repugnant to the protection of the free exercise of religion found in the First Amendment of the United States Constitution. A decision upon this question would have an obvious impact upon hundreds of tribes and thousands of Indian persons across the Nation who still practice traditional religious ceremonies in places and ways the states believe they have jurisdiction. In recent years there was been a well-known and great revival among Indian people of interest and belief in their culture and traditions. The importance to the United States of protecting and guaranteeing the integrity of religious practices and traditions of Indian people, its first residents, was strongly

affirmed by Congress with the passage of the Indian Religious Freedom Act, 42 U.S.C. §1996. However, the Act failed to provide adequate remedies or mechanisms for the enforcement of the Congressional declarations, and Indian plaintiffs have repeatedly failed to obtain the protection of their religious practices and traditions thereunder. Appellants believe that the First Amendment provides the protection of the religious practices so integrally a part of the lives of traditional Indian persons.

Furthermore, the South Dakota Supreme Court's opinion raises another serious question which affects all future First Amendment claimants. The Court ruled that in order to meet their initial First Amendment burden -- proving that the state statute operated or was exercised as a "coercive effect" on the practice of their religion, Abington Sch. Dist. v. Shempp, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844, 858 (1963) -- the Appellants were required to prove only that the statute as actually enforced infringed upon their traditional religious ceremonies, but additionally that there existed no other lawful alternative methods to perform the ceremonies. Or, in other words, as long as any alternatives existed at all, there could be no coercion of First Amendment rights. This showing is a great expansion of the previously defined initial burden on a First Amendment claimant. This expansive interpretation of the initial burden has been specifically rejected by the Alaska Supreme Court in the Frank case when it rejected the State's argument that the Indian defendant had to prove that deer could not have been substituted for moose in the potlach feast. The Fourth Circuit has similarly rejected this expansion of the burden in Edwards v. Maryland State Fair & Agr. Soc., 628 F.2d 282, 286 (4th Cir. 1980) in holding that religious activity could not be abridged on the rationale that it could be exercised

in some alternative lawful place. (Citing, Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939), which involved freedom of speech). The South Dakota Supreme Court decision, if allowed to remain, will establish a clear precedent for all future First Amendment questions in South Dakota and potentially for other jurisdictions as well, seriously affecting the First Amendment rights not only of Indian persons, but the rights of all persons in the United States.

Treaty Issue

The South Dakota Supreme Court's ruling that it lacked subject matter jurisdiction to decide whether or not the 1868 Ft. Laramie Treaty, supra, preempted the state open fire statute was certainly wrong. It clearly confused the exclusive jurisdiction of the United States Court of Claims over monetary claims by Indian people for loss of treaty rights with the jurisdiction to decide whether rights still possessed by Indian persons under treaty are protected from infringement by the state pursuant to state statute. Both federal and state courts have repeatedly assumed jurisdiction over the latter circumstance. See, Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 705, 20 L.Ed.2d 697 (1968); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); and Antoine v. Washington, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975). The effect of the South Dakota Supreme Court's decision is to deprive all Indian persons of any redress for the protection of their federally guaranteed treaty rights when such rights become an issue in any court in South Dakota. The decision is clearly at odds with the previously cited United States Supreme Court opinions and should be overturned by this Court in the

interest of justice.

Whether or not the 1868 Ft. Laramie Treaty preempts the state open fire statute must initially turn upon whether Appellants have retained any residual rights under that treaty to the free exercise of their religion within the boundaries of the Treaty. The United States attempted to abrogate much of the Treaty with the Act of 1877, 19 Stat. 254. See, United States v. Sioux Nations of Indians, supra. However, Appellants firmly believe that they are still possessed minimally of certain residual rights, including the free exercise of their religion, because there was not express abrogation of those rights by the Act of 1877 which only, at most, took the property rights to own and possess the Black Hills of South Dakota. The question of whether inherent Indian treaty rights can survive general federal abrogation of a treaty has already been decided affirmatively by this Court in Menominee Tribe v. United States, supra. However, the Menominee Tribe case involved the right to hunt on former treaty lands free of state general hunting regulations, while the case at bar raises for the first time whether religious rights are treaty protected rights like those to hunt and fish which survive unless expressly abrogated by Congress.

The importance of this question is obviously substantial for the hundreds of thousands of Indian persons in the United States. It is particularly so for the many traditional Indian persons who have found it difficult to freely exercise their religious beliefs without state interference or who have, as mentioned previously, been unable to gain the protection of their religious practices and traditions intended by Congress with the Indian Religious Freedom Act, supra. The denial of these freedoms to Indian persons not only denigrates the strength

and integrity of our Constitution and treaties, but also continues the 400-year-old process of cultural genocide which our nation has overtly and, at times, covertly practiced upon our first inhabitants through the imposition of non-Indian values, ways, and world-views upon them. The United States Supreme Court has on many occasions come to the aid of our nation's oppressed minorities, rightfully recognizing that the affirmance and guarantee of their rights under our Constitution is an affirmation and guarantee of the rights of all citizens. It is in this spirit that the Appellants request a full review and reversal of the lower court's decision.

Preemption by Forest Service Regulations

The South Dakota Supreme Court's decision on the third issue -- that the state open fire statute was not preempted by conflicting federal regulations -- flies in the face of the long established principle that a state statute is void to the extent that it actually conflicts with a valid federal law. Ray v. Atlantic Richfield Co., 435 U.S. 151, 158, 98 S.Ct. 988, 55 L.Ed. 2d 179 (1978); also, Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 613, 99 S.Ct. 1905, 60 L.Ed.2d 508, 520 (1979). The Court did not deny that conflicts existed between the state open fire statute and the federal fire regulations to the extent that the District Ranger might have been able to issue the permit had he applied the federal regulation to the situation. Instead, the Court reasoned that another federal regulation, 36 C.F.R. §211.3, and a Cooperative Fire Control Agreement entered into by a low-level Forest Service official, resolved any and all such conflicts by authorizing the District Ranger to enforce the state statute and ignore the conflicts created by the federal regulations, 36 C.F.R. Part 261. However, the Court was over zealous in its affirmance of the validity of the state law because a review of §211.3 reveals no authorization for the

enforcement of a conflicting state law and a review of the Forest Service regulations reveals no authorization for a low-level Forest Service official to enter into any agreements with the state to substitute conflicting state law for the federal regulation.

This issue, therefore, presents not only the usual but obviously substantial Supremacy Clause and state's rights questions, but also raises more specific questions surrounding the resolution of conflict between state and federal law. By nature, these questions not only affect the activities of citizens who are regulated by such laws, but are additionally important to all government officials and agencies which are commonly confronted with such conflicts in the fulfillment of their public responsibilities. If the decision is allowed to stand, the previously mentioned long established principle regarding the Supremacy Clause will not remain so settled and the role and authority of both the Constitution and federal officials will be seriously undermined in South Dakota and elsewhere. Unless reversed, the decision raises doubts whether citizens can or should rely on federal law where there is a conflict with state requirements. However, if such persons do not rely on conflicting federal law, they place themselves in jeopardy as well for violations of such laws, and, as in the case of Appellants, are left with the sole alternative of not exercising their First Amendment religious freedom at all.

For the above-stated reasons, Appellants urge this Court to accept this appeal for plenary consideration with full briefing and argument.

Respectfully submitted,

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may be prescribed by the Interior Department: Provided, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

Source: February 19, 1867, 15 Stat 505; Ratified April 15, 1867; Proclamation May 2, 1867.

1868

TREATY

Document No. 18

TREATY WITH THE SIOUX — BRULE, OGLALA, MINICONJOU, YANKTONAI, HUNKPAPA, BLACKFEET, CUTHEAD, TWO KETTLE, SANS ARCS, AND SANTEE — AND ARAPAHO, 1868

Articles of a treaty made and concluded by and between Lieutenant-General William T. Sherman, General William S. Harney, General Alfred H. Terry, General C. C. Augur, J. B. Henderson, Nathaniel G. Taylor, John B. Sanborn, and Samuel F. Tappan, duly appointed commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, by their chiefs and head-men, whose names are hereto subscribed, they being duly authorized to act in the premises.

ARTICLE 1.

From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to

them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be re-imbursed therefor.

ARTICLE 2.

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

ARTICLE 3.

If it should appear from actual survey or other satisfactory examination of said tract of land that it contains less than one hundred and sixty acres of tillable land for each person who, at the time, may be authorized to reside on it under the provisions of this treaty, and a very considerable number of such persons shall be disposed to commence cultivating the soil as

farmers, the United States agrees to set apart, for the use of said Indians, as herein provided, such additional quantity of arable land, adjoining to said reservation, or as near to the same as it can be obtained, as may be required to provide the necessary amount.

ARTICLE 4.

The United States agrees, at its own proper expense, to construct at some place on the Missouri River, near the center of said reservation, where timber and water may be convenient, the following buildings, to wit: a warehouse, a store-room for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular-saw mill, with a grist-mill and shingle-machine attached to the same, to cost not exceeding eight thousand dollars.

ARTICLE 5.

The United States agrees that the agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

ARTICLE 6.

If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family shall desire

to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land-book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it, by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Sioux Land-Book."

The President may, at any time, order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper. And it is further stipulated that any male Indians, over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or who shall hereafter become a resident or occupant of any reservation or Territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians, which is not mineral land, nor reserved by the United States for special purposes other than Indian occupation, and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands. Upon application in writing, sustained by the proof of two disinterested witnesses, made to the register of the local land-office when the land sought to be entered is within a land district, and when the tract sought to be entered is not in any land district, then

upon said application and proof being made to the Commissioner of the General Land-Office, and the right of such Indian or Indians to enter such tract or tracts of land shall accrue and be perfect from the date of his first improvements thereon, and shall continue as long as he continues his residence and improvements, and no longer. And any Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall, at the same time, retain all his rights to benefits accruing to Indians under this treaty.

ARTICLE 7.

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

ARTICLE 8.

When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding in value twenty-five dollars.

And it is further stipulated that such persons as commence farming shall receive instruction from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

ARTICLE 9.

At any time after ten years from the making of this treaty, the United States shall have the privilege of withdrawing the physician, farmer, blacksmith, carpenter, engineer, and miller herein provided for, but in case of such withdrawal, an additional sum thereafter of ten thousand dollars per annum shall be devoted to the education of said Indians, and the Commissioner of Indian Affairs shall, upon careful inquiry into their condition, make such rules and regulations for the expenditure of said sum as will best promote the educational and moral improvement of said tribes.

ARTICLE 10.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency-house on the reservation herein named, on or before the first day of August of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of home-made socks.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress may, by law, change the appropriation to other purposes; but in no event shall the

amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery. And it is hereby expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians or family of persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow, and one good well-broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE 11.

In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase. And they, the said Indians, further expressly agree:

1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.

2d. That they will permit the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. They will never capture, or carry off from the settlements, white women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte River and westward to the Pacific Ocean, and they will not in future

object to the construction of railroads, wagon-roads, mail-stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head-man of the tribe.

7th. They agree to withdraw all opposition to the military posts or roads now established south of the North Platte River, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE 12.

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

ARTICLE 13.

The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE 14.

It is agreed that the sum of five hundred dollars annually, for three years from date, shall be expended in presents to the ten persons of said tribe who in the judgment of the agent may grow the most valuable crops for the respective year.

ARTICLE 15.

The Indians herein named agree that when the agency-house or other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but

they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article 11 hereof.

ARTICLE 16.

The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same; and it is further agreed by the United States that within ninety days after the conclusion of peace with all the bands of the Sioux Nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

ARTICLE 17.

It is hereby expressly understood and agreed by and between the respective parties to this treaty that the execution of this treaty and its ratification by the United States Senate shall have the effect, and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and bands of Indians as become parties to this treaty, but no further.

Source: April 29, 1868, 15 Stat 635; Ratified February 16, 1869; Proclamation February 24, 1869.

Document No. 19

AMENDED AGREEMENT WITH SISSETON AND WAHPETON BANDS OF DAKOTA OR SIOUX INDIANS, 1873

Whereas, the Sisseton and Wahpeton Bands of Dakota or Sioux Indians, on the 20th day of September A. D. 1872 made and entered into an agreement in writing, signed on one part by the Chiefs and headmen of said bands, with the assent and approval of the members of [said] bands, and upon the other part by Moses N. Adams, James Smith, jr., and William H. Forbes, commissioners on the part of the United States; which said agreement is as follows, to wit:

"Whereas, the Sisseton and Wahpeton bands of Dakota or Sioux Indians made and concluded a treaty with the United States, at the city of Washington, D.C., on the 19th day of February, A. D. 1867, which was ratified, with certain amendments, by the Senate of the United States on the 15th day of April, 1867, and finally promulgated by the President of the United States on the 2d day of May, in the year aforesaid, by which the Sisseton and Wahpeton bands of Sioux Indians ceded to the United States certain privileges and rights supposed to belong to said bands in the territory described in article II of said treaty, and

"Whereas, it is desirable that all said territory, except the portion thereof comprised in what is termed the permanent reservations, particularly described in articles III and IV of said treaty, shall be ceded absolutely to the United States, upon such consideration as in justice and equity should be paid therefor by the United States; and

"Whereas, said territory, now proposed to be ceded, is no longer available to said Indians for the purposes of the chase, and such value or consideration is essentially necessary in order to enable said bands interested therein to cultivate portions of said permanent reservations, and become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry; therefore, the said bands, represented in said treaty, and parties thereto, by their chiefs and head-men, now assembled in council, do propose to M. N. Adams, William H. Forbes, and James Smith, jr., commissioners on behalf of the United States, as follows:

"First. To cede, sell, and relinquish to the United States all their right, title, and interest in and to all lands and territory, particularly described in article II of said treaty, as well as all lands in the Territory of Dakota to which they have title or interest, excepting the said tracts particularly described and bounded in articles III and IV of said treaty, which last named tracts and territory are expressly reserved as permanent reservations for occupancy and cultivation, as contemplated by articles VIII, IX, and X of said treaty.

"Second. That, in consideration of said cession and relinquishment, the United States shall advance and pay, annually, for the term of ten years from and after the acceptance by the United States of the proposition herein submitted, eighty thousand (80,000) dollars, to be expended under the direction of the President of the United States, on the plan and in accordance with the provisions of the treaty aforesaid, dated February 19, 1867, for goods and provisions, for the erection of manual-labor and public school-houses, and for the support of manual-labor

amount shall be expended until after the ratification, by said Indians, of said agreement as hereby amended."

And whereas, the said Bands of Dakota or Sioux Indians have been duly assembled in council, and therein represented by the chiefs and head-men, and the provisions of said act of Congress, and amendments thereby made to the said above recited agreement, having been fully explained by the commissioners on the part of the United States, and the said agreement as amended having been fully interpreted, and now being understood, we the said chiefs and head-men of the said Sisseton and Wahpeton Bands, duly authorized by our people so to do, do hereby accept, assent to, confirm, ratify and agree to the said amendments, and to the said agreement as amended, and declare that the same is, and shall hereafter be binding upon us and the members of said Bands.

Witness our hands and seals at the Lac Traverse agency, Dakota Territory, this second day of May, A. D. 1873.

Source: May 2, 1873; Confirmed February 14, 1873, 17 Stat 456; June 24, 1874, 18 Stat 167.

ACT OF 1877

Document No. 20

ACT RATIFYING AGREEMENT WITH SIOUX INDIANS AND NORTHERN ARAPAHO AND CHEYENNE INDIANS

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a certain agreement made by George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bulis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, with the different bands of the Sioux Nation of Indians, and also the Northern Arapaho and Cheyenne Indians, be, and the same is hereby, ratified and confirmed: Provided, That nothing in this act shall be construed to authorize the removal of the Sioux Indians to the Indian Territory and the President of the United States is hereby directed to prohibit the removal of any portion of the Sioux Indians to the Indian Territory until the same shall be authorized by an act of Congress hereafter enacted, except article four, except also the following portion of article six: "And if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling-house" said article not having been agreed to by the Sioux Nation; said agreement is in words and figures following, namely: "Articles of agreement made pursuant to the provisions of an act of Congress entitled "An

act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes," approved August 15, 1876, by and between George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bulis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, and also the Northern Arapahoes and Cheyennes, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises.

"Article 1. The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

"Article 2. The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

"Article 3. The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity

of the Missouri River, as the President of the United States shall designate.

"Article 4. [The Government of the United States and the said Indians, being mutually desirous that the latter shall be located in a country where they may eventually become self-supporting and acquire the arts of civilized life, it is therefore agreed that the said Indians shall select a delegation of five or more chiefs and principal men from each band, who shall, without delay, visit the Indian Territory under the guidance and protection of suitable persons, to be appointed for that purpose by the Department of the Interior, with a view to selecting therein a permanent home for the said Indians. If such delegation shall make a selection which shall be satisfactory to themselves, the people whom they represent, and to the United States, then the said Indians agree that they will remove to the country so selected within one year from this date. And the said Indians do further agree in all things to submit themselves to such beneficient plans as the Government may provide for them in the selection of a country suitable for a permanent home, where they may live like white men.]

"Article 5. In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor, (the aged, sick, and infirm excepted;) and as an incentive to industrious habits the Commissioner of Indian Affairs may provide that such persons be furnished in payment for their labor such

other necessary articles as are requisite for civilized life. The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

"Article 6. Whenever the head of a family shall, in good faith, select an allotment of land upon such reservation and engage in the cultivation thereof, the Government shall, with his aid, erect a comfortable house on such allotment; [and if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling-house.]

"Article 7. To improve the morals and industrious habits of said Indians, it is agreed that the agent, trader, farmer, carpenter, blacksmith, and other artisans employed or permitted to reside within the reservation belonging to the Indians, parties to this agreement, shall be lawfully married and living with their respective families on the reservation; and no person other than an Indian of full blood, whose fitness, morally or otherwise, is not, in the opinion of the Commissioner of Indian Affairs, conducive to the welfare of said Indians, shall receive any benefit from this agreement or former treaties, and may be expelled from the reservation.

"Article 8. The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.

"Article 9. The Indians, parties to this agreement, do hereby solemnly pledge themselves, individually and collectively, to observe each and all of the stipulations herein contained, to select allotments of land as soon as possible after their removal to their permanent home, and to use their best efforts to learn to cultivate the same. And they do solemnly pledge themselves that they will at all times maintain peace with the citizens and Government of the United States; that they will observe the laws thereof and loyally endeavor to fulfill all the obligations assumed by them under the treaty of 1868 and the present agreement, and to this end will, whenever requested by the President of the United States, select so many suitable men

from each band to co-operate with him in maintaining order and peace on the reservation as the President may deem necessary, who shall receive such compensation for their services as Congress may provide.

"Article 10. In order that the Government may faithfully fulfill the stipulations contained in this agreement, it is mutually agreed that a census of all Indians affected hereby shall be taken in the month of December of each year, and the names of each head of family and adult person registered; said census to be taken in such manner as the Commissioner of Indian Affairs may provide.

"Article 11. It is understood that the term reservation herein contained shall be held to apply to any country which shall be selected under the authority of the United States as the future home of said Indians.

"This agreement shall not be binding upon either party until it shall have received the approval of the President and Congress of the United States.

"Dated and signed at Red Cloud agency, Nebraska, September 26, 1876.

"GEORGE W. MANYPENNY.	[SEAL.]
"HENRY B. WHIPPLE.	[SEAL.]
"J. W. DANIELS.	[SEAL.]
"ALBERT G. BOONE.	[SEAL.]
"H. C. BULIS.	[SEAL.]
"NEWTON EDMUNDS.	[SEAL.]
"A. S. GAYLORD.	[SEAL.]

"Attest:
"CHARLES M. HENDLEY,
"Secretary.

[Here follows the signature of Marpuja-luta, and others of the Oglala Sioux, Arapaho, and Cheyenne.]

"Dated and signed at Spotted Tail agency, Nebraska, September 23, 1876.

[Here follows the signature of Sinta-gleska, and others of the Brule Sioux.]

"The foregoing articles of agreement having been fully explained to us in open council, we, the chiefs and headmen of the various bands of Sioux Indians, receiving rations and annuities at the Cheyenne River agency, in the Territory of Dakota, do hereby consent and agree to all the stipulations therein contained, with the exception of so much of article 4 of said agree-

in all other respects the said article remaining in full force and effect.

"Witness our hands and seals at Cheyenne River agency, Territory of Dakota, this 16th day of October, A.D. 1876.

[Here follows the signature of Kangi-wiyaka, and others.]

"The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen of the various bands of Sioux Indians receiving rations and annuities at the Standing Rock agency, in the Territory of Dakota, do hereby consent and agree to all the stipulations therein contained, with the exception of so much of article four of said agreement as relates to our visit and removal to the Indian Territory; in all other respects the said article remaining in full force and effect.

"Witness our hands and seals at Standing Rock agency, Territory of Dakota, this 11th day of October, A.D. 1876.

[Here follows the signature of Mato-nonpa, and others.]

"The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen of the Sioux Indians, receiving rations and annuities at Crow Creek agency, in the Territory of Dakota, do hereby consent and agree to all the stipulations therein contained, with the exception of so much of article 4 of said agreement as relates to our visit and removal to the Indian Territory; in all other respects the said article remaining in full force and effect.

"Witness our hands and seals at Crow Creek agency, Territory of Dakota, this 21st day of October, A.D. 1876.

[Here follows the signature of Wanigi-ska, and others.]

"The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen of the Sioux Indians, receiving rations and annuities at Lower Brule agency, in the Territory of Dakota, do hereby consent and agree to all the stipulations therein contained, with the exception of so much of article 4 of said agreement as relates to our visit and removal to the Indian Territory; in all other respects the said article remaining in full force and effect.

Witness our hands and seals at Lower Brule agency, Territory of Dakota, this 24th day of October, A.D. 1876.

[Here follows signature of Maza-oyate, and others.]

"The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen of the Sioux Indians, receiving rations and annuities at the Santee reservation, in Knox County, in the State of

16 U.S.C § 551. **Protection of national forests; rules and regulations [Partial repeal; see other provisions note]**

The Secretary of the Interior [Secretary of Agriculture] shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations [national forests] which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one [16 USCS § 471], and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this Act [This section and 16 USCS §§ 473 et seq.] or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States commissioner [magistrate] specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in title 18, United States Code, section 3401, subsections (b), (c), (d), and (e), as amended [18 USCS § 3401(b)-(e)].

(June 4, 1897, c. 2, § 1, 30 Stat. 35; Oct. 23, 1962, P.L. 87-869, § 6, 76 Stat. 1157; Aug. 31, 1964, P.L. 88-537, 78 Stat. 745; Oct. 21, 1976, P.L. 94-579, Title VII, § 706(a), 90 Stat. 2793.)

36 C.F.R. § 261.1a Permits.

The Chief, each Regional Forester, each Forest Supervisor, and each District Ranger or equivalent officer may issue permits to persons authorizing the occupancy or use of a road, trail, area, river, lake, or other part of the National Forest System in accordance with authority which is delegated elsewhere in this Chapter or in the Forest Service Manual. The issuing officer may authorize in the permit an act or omission which would otherwise be a violation of a Subpart A or Subpart C regulation or a Subpart B order. The issuing officer may include in any permit such conditions as he considers necessary for the protection and administration of the National Forest System, or for the promotion of public health, safety, or welfare.

36 C.F.R. § 261.5 Fire.

The following are prohibited:

(a) Carelessly or negligently throwing or placing any burning, glowing, or ignited substance, or any other substance or thing which may cause a fire, into any place where it might start a fire.

(b) Firing any tracer bullet or incendiary ammunition.

(c) Causing timber, trees, slash, brush or grass to burn except as authorized by permit.

(d) Leaving a fire without completely extinguishing it.

(e) Allowing a fire to escape from control.

(f) Building, attending, maintaining, or using a campfire without removing all flammable material from around the campfire adequate to prevent its escape.

S.D.C.L. 34-35-17. **Issuance of permit for open fire in Black Hills district — Conditions required.** Any United States forest service supervisor, or his designee, the state forester or his designee shall have authority to issue a permit upon an application to any person to start an open fire within the Black Hills forest fire protection district if in his opinion such fire will not endanger the life or property of another, or deny such permit if in his opinion the climatic conditions or location of the material to be burned is such that the burning would endanger the life or property of others and he may issue a permit subject to such conditions and restrictions as he may consider necessary to prevent the spread of the fire permitted; and he may revoke a permit issued by him upon the change of climatic or other conditions which he considers would make the burning unsafe.

S.D.C.L. 34-35-16. **Permit required for open fire in Black Hills district.** The starting of an open fire within the Black Hills forest fire protection district or the permitting of a fire to burn in his presence by a person or a group of persons is hereby prohibited unless a permit to do so is first obtained from the state forester or his designee or from the United States forest service supervisor or his designee. An open fire as used in this section and § 34-35-17 shall mean any fire to burn slash, brush, grass, stubble, debris, rubbish, or other inflammable material not enclosed in a stove, sparkproof incinerator, or an established fireplace approved or constructed by public agencies in designated recreation areas.

Case No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term

* * * *

WALTER TEN FINGERS, Appellant,

v.

STATE OF SOUTH DAKOTA, Appellee,

* * * *

On Appeal from the

Supreme Court of South Dakota

* * * *

NOTICE OF APPEAL

* * * *

ANDREW B. REID
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Chadron, Nebraska 69337
(308) 432-4259 Attorney for Appellant

MARK V. MEIERHENRY
Attorney General's Office
State Capitol Building
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(605) 773-3215 Attorney for Appellee

* * * *

PLEASE TAKE NOTICE that Walter Ten Fingers does hereby appeal the decision of the Supreme Court of South Dakota in State of South Dakota v. Walter Ten Fingers, No. 13656, which was entered on the 10th day of November, 1982. This appeal is taken pursuant to 28 U.S.C. §1257(2) and Rule 10 of the Rules of the United States Supreme Court.

Dated this 7th day of February, 1983.

Andrew B. Reid

Andrew B. Reid
Attorney for Appellant

Case No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term

* * * *

ALEX WAKEMAN, Appellant,

v.

STATE OF SOUTH DAKOTA, Appellee,

* * * *

On Appeal from the

Supreme Court of South Dakota

* * * *

NOTICE OF APPEAL

* * * *

ANDREW B. REID
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(605) 773-3215 Attorney for Appellee

* * * *

PLEASE TAKE NOTICE that Alex Wakeman does hereby appeal the decision of the Supreme Court of South Dakota in State of South Dakota v. Alex Wakeman, No. 13655, which was entered on the 10th day of November, 1982. This appeal is taken pursuant to 28 U.S.C. §1257(2) and Rule 10 of the Rules of the United States Supreme Court.

Dated this 7th day of February, 1983.

Andrew B. Reid
Andrew B. Reid
Attorney for Appellant

NO. 82-6203

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

ALEX WAKEMAN AND ROBERT TEN FINGERS

Appellants,

v.

STATE OF SOUTH DAKOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

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SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

COMES NOW the Appellee and hereby moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme

Court of South Dakota on the grounds that no substantial federal question is involved and that no preemption of state law by federal regulation is present.

I

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE.

A. THE STATUTES.

This appeal raises the issue of the validity of the application of the South Dakota open fire statutes, SDCL 34-35-16 and 34-35-17, to individuals starting such fires in the Black Hills National Forest.

SDCL 34-35-16 requires that a permit be obtained from either the State Forester or the United States Forest Supervisor, or from one of their designees, before starting an open fire in the Black Hills forest fire protection district. The forest fire protection district encompasses the Black Hills National Forest.

SDCL 34-35-17 sets out the requirements governing the issuance of permits for open fires in the Black Hills forest fire protection district. The permit may be issued after a determination that such a fire will endanger neither life nor property and that the location of the fire and climatic conditions pose no threat to safety and property. The permit may include conditions and restrictions, and is subject to revocation.

B. PROCEEDINGS BELOW.

Appellants are part of a group arrested on November 15, 1981, for starting an open fire in the Black Hills fire protection district without a permit, in violation of SDCL 34-35-16. The Appellants were convicted of the above violation by the Circuit Court, Seventh Judicial Circuit, Custer County, South Dakota, on December 8, 1981.

The Appellants appealed their convictions to the South Dakota Supreme Court and that Court, on November 10, 1982, affirmed the circuit court's

decision. The opinion of the South Dakota Supreme Court is State of South Dakota v. Dewey Brave Heart, et al., 326 N.W.2d 220 (S.D. 1982).

C. STATEMENT OF FACTS

Appellants were members of an encampment begun in the Black Hills forest fire protection district about the middle of October, 1981. The Appellants made a request, on November 12, 1981, through another individual, for a permit to burn an open fire in the fire protection district. The request was directed to the United States Forest Service Ranger, who denied the application because it failed to specify the fire's location, date, time, and a person to be present at the fire location at time of burning. The Ranger also indicated that weather conditions precluded issuance of a permit at that time and that no permits would be issued until the weather changed.

The Appellants made no attempt to correct the deficiencies in their request nor did they

apply for a permit when weather conditions changed. The Appellants, as noted supra, were arrested on November 15, 1981, by South Dakota law enforcement officials, who came to the scene of the encampment and discovered the open fires. The Appellants' convictions and subsequent appeals to the Supreme Court of South Dakota and this Court followed.

II

ARGUMENT

A. THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Appellants' contention that South Dakota's open fire statute, SDCL 34-35-16, is repugnant to the First Amendment to the United States Constitution and that the statute's application prohibited the Appellants from using open fires for religious purposes is totally without merit.

The Appellants assert that, as putative members of the Lakota Indian Nation, they sought

to burn open fires in the Black Hills National Forest as part of their religious ceremonies. They contended applying the open fire statute to them prohibited the free exercise of their religion.

The free exercise of one's religious convictions has been a right zealously protected by the decisions of this Court. However, following the tenets and practices of one's religious beliefs has not been held to be wholly outside the reach of state regulation. "The state interest must be of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15, 24 (1972). State interests of the "highest order" can outweigh legitimate claims under the Free Exercise Clause. Wisconsin v. Yoder, supra, 32 L.Ed.2d 25. Conduct or actions which posed a substantial threat to the public safety and order have been

held to be legitimately regulated by the state, although such behavior was religiously motivated. See, Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, 970 (1963).

The plaintiffs' showing of the "coercive effect," see, Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), of the challenged regulation or statute must be balanced against the interest which the state seeks to uphold. Finally, the state may justify an impingement upon religious liberty by showing that its regulation is "the least restrictive means of achieving some compelling state interest." Thomas, supra, 67 L.Ed.2d at 634.

Applying the above principles to the instant appeal, it is clear that no violation of the Appellants' First Amendment rights occurred. The State, in enforcing its open fire statute, was

exercising its police power to ensure the protection of people and property. The Appellants did not provide, in the request for a permit, the location or the date when the fire would commence. The dangers of a possibly unattended fire in a thickly wooded National Forest are obvious, and justified the State's prohibiting such a fire where the Appellants had failed to indicate that they would follow proper and necessary procedures.

In addition, the forest ranger's refusal of the application for a permit listed unfavorable weather conditions as a reason for denying the Appellants' request.

Despite their initial failure to secure a permit, the Appellants were not denied the right to freely exercise their religion. The Appellants could have reapplied for a permit, but chose to burn their fires in violation of the law. The minimal requirements that were imposed on the Appellants, e.g., date, time, and location of fire;

insuring that the fire would not be unattended, did not place an onerous burden upon the exercise of Appellants' First Amendment rights. In this instance, those rights were properly subordinated to the State's interest in insuring that possibly dangerous fires are properly contained.

B. THE SOUTH DAKOTA FIRE STATUTES HAVE NOT BEEN PREEMPTED EITHER BY THE FT. LARAMIE TREATY OF 1868 OR FEDERAL REGULATIONS CONCERNING THE PROTECTION OF NATIONAL FORESTS.

The Appellants' contention that the South Dakota open fire statute as applied by the Appellee to Appellants' use of open pit ceremonial fires has been preempted by the 1868 Ft. Laramie Treaty, and therefore is invalid as repugnant to the Treaty and Article VI, Clause 2 of the United States Constitution is without merit.

The Ft. Laramie Treaty of 1868, 15 Stat. 635, established the Great Sioux Reservation, with boundaries which encompassed what is half

of the area of South Dakota. United States v. Sioux Nation of Indians, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844, 850, n.2 (1980). The Treaty was abrogated, however, by the Act of 1877, 19 Stat. 254. The 1877 Act provided that the Black Hills were ceded to the United States, in exchange for the Government's agreement to provide the tribes with subsistence rations.

The fact that Congress abrogated the 1868 Ft. Laramie Treaty disposes of Appellants' claim that the state law is preempted by the terms of that agreement. The Treaty having no legal existence, it cannot be said to preempt enforcement of State law. The question of whether Indian treaty rights survived abrogation of particular treaties is inapposite. The rights of Indians, and of all Americans, to exercise their First Amendment rights is subject to the type of regulation discussed supra. Indians may have been able to retain hunting and fishing rights on

former reservation land, see Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 705, 20 L.Ed.2d 697 (1968), but the retention of such rights does not preclude appropriate state regulation. The Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968).

Appellants' contention that application of the South Dakota open fire statute as applied to Appellants' religious ceremonies is preempted by federal regulations and that said statute is therefore invalid is also without merit.

The existence of federal regulations concerning the management of National Forests does not preempt state legislation in the same area. The state statute would be void to the extent that it conflicts with a similar federal statute or regulation, but no conflict exists in the instant case.

16 U.S.C.A. § 551a authorizes the Secretary of Agriculture, in regulating the National Forests,

to cooperate with any state in which such lands are located for the purpose of enforcing state law. The language of the statute is clear concerning the State's right to enforce its laws in a National Forest: "This section [16 U.S.C.A. § 551a] shall not deprive any state or political subdivision thereof of its right to exercise civil and criminal jurisdiction, within or on lands which are a part of the national forest system." Congress obviously has no intention to preempt state authority in such areas, and lacking a congressional declaration to that effect or a federal regulatory scheme so perversive that no room remains for state control, see, Ray v. Alantic Richfield Company and Seatrain Lines, Inc., 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978), South Dakota may enforce its open fire statute within the Black Hills forest fire protection district.

In addition, the South Dakota Department of Game, Fish and Parks and the United States

Forest Service had entered into a "Cooperative Fire Control Agreement" which provides for fire protection within the Black Hills forest fire protection district. Such agreements are authorized by 16 U.S.C.A. § 565a-1. Clearly, the South Dakota open fire statute has not been preempted by federal regulations.

III

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Respectfully submitted,

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APPENDIX

SDCL 34-35-15. Black Hills forest fire protection district--Area included. To protect the timber on areas subject to unusual fire dangers, there is hereby created the Black Hills forest fire protection district, consisting of all that part of the state described by metes and bounds as follows: Commencing at a point on the Wyoming-South Dakota state line at the junction of the Belle Fourche river and said state line; thence southeast along the Belle Fourche river to the city of Bell Fourche; thence southeast along the Chicago and Northwestern railroad right of way through St. Onge, Whitewood, Sturgis, Tilford, Piedmont and Black Hawk to Rapid City; thence south along the Chicago and Northwestern railroad right of way through Hermosa, Fairburn and Buffalo Gap to the Cheyenne river; thence west and northwest along the Cheyenne river to the Wyoming-South Dakota state line; thence north along said state line to the place of beginning, excepting therefrom areas within the limits of incorporated towns.

SDCL 34-35-16. Permit required for open fire in Black Hills district. The starting of an open fire within the Black Hills forest fire protection district or the permitting of a fire to burn in his presence by a person or a group of persons is hereby prohibited unless a permit to do so is first obtained from the state forester or his designee or from the United States forest service supervisor or his designee. An open fire as used in this section and § 34-35-17 shall mean any fire to burn slash, brush, grass, stubble, debris, rubbish, or other inflammable material not enclosed in a stove, sparkproof incinerator, or an established fireplace approved or constructed by public agencies in designated recreation areas.

SDCL 34-35-17. Issuance of permit for open fire in Black Hills district--Conditions required. Any United States forest service supervisor, or his designee, the state forester or his designee shall have authority to issue a permit upon an application to any person to start an open fire within the Black Hills forest fire protection district if in his opinion such fire will not endanger the life or property of another, or deny such permit if in his opinion the climatic conditions or location of the material to be burned is such that the burning would endanger the life or property of others and he may issue a permit subject to such conditions and restrictions as he may consider necessary to prevent the spread of the fire permitted; and he may revoke a permit issued by him upon the change of climatic or other conditions which he considers would make the burning unsafe.

16 U.S.C.A. § 551a. Cooperation by Secretary of Agriculture with states and political subdivisions in law enforcement.

The Secretary of Agriculture, in connection with the administration and regulation of the use and occupancy of the national forests and national grasslands, is authorized to cooperate with any State or political subdivision thereof, on lands which are within or part of any unit of the national forest system, in the enforcement or supervision of the laws or ordinances of a State or subdivision thereof. Such cooperation may include the reimbursement of a State or its subdivision for expenditures incurred in connection with activities on national forest system lands. This section shall not deprive any State or political subdivision thereof of its right to exercise civil and criminal jurisdiction, within or on lands which are a part of the national forest system.

Pub.L. 92-82, Aug. 10, 1971, 85 Stat. 303

16 U.S.C.A. § 565a-1. Cooperative agreements between Secretary of Agriculture and public or private agencies, organizations, institutions, and persons covering Forest Service programs; authority; funding.

To facilitate the administration of the programs and activities of the Forest Service, the Secretary is authorized to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons to construct, operate, and maintain cooperative pollution abatement equipment and facilities, including sanitary landfills, water systems, and sewer systems; to engage in cooperative manpower and job training and development programs; to develop and publish cooperative environmental education and forest history materials; and to perform forestry protection, including fire protection, timber stand improvement, debris removal, and thinning of trees. The Secretary may enter into aforesaid agreements when he determines that the public interest will be benefited and that there exists a mutual interest other than monetary considerations. In such cooperative arrangements, the Secretary is authorized to advance or reimburse funds to cooperators from any Forest Service appropriation available for similar kinds of work or by furnishing or sharing materials, supplies, facilities, or equipment without regard to the provisions of section 529 of Title 31, relating to the advance of public moneys.

Pub.L. 94-148, § 1, Dec. 12, 1975, 89 Stat. 804.

Case No. 82-6203

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term

* * * * * *

ALEX WAKEMAN and WALTER TEN FINGERS, Appellants,

v.

STATE OF SOUTH DAKOTA, Appellee.

* * * * * *

On Appeal from the

Supreme Court of South Dakota

* * * * * *

MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

* * * * * *

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ARGUMENT

First Amendment Issue

This memorandum is submitted in opposition to Appellee's Motion to Dismiss or Affirm the appeal herein. As to the first issue of the appeal, that the South Dakota open fire statutes are repugnant to the First Amendment protection of Appellants' religious activities, the Appellee has argued that the appeal on this issue is without merit because the facts of the case allegedly show that enforcement of the statutes is the least restrictive means of achieving the compelling state interest of protecting the public from forest fires. Although Appellants strongly believe that the record does not support Appellee's assertions, these concerns are premature because the South Dakota Supreme Court never reached this question. Rather, the lower court ruled that the Appellants had not met their initial burden of showing that the statutes as enforced had a coercive effect on the exercise of their religion because they had not shown that there existed no other lawful alternative methods to perform their religious ceremonies. If, in the lower court's eyes, the Appellants had met their initial burden of showing coercion, the burden would have shifted to the state to show that the impingement upon their religious liberty was the least restrictive means of achieving the compelling state interest. Because the lower court never reached this question of the state's burden, Appellee's arguments in support of its motion are not relevant to this appeal. The issue, as clearly stated in the Appellants' Joint Jurisdictional Statement and by the South Dakota Supreme Court, is whether or not the Appellants in meeting their initial burden were required to prove that no other lawful alternative methods existed for the performance of their religious ceremonies. Appellee has failed to address this issue.

Even had the lower court reached the issue concerning the State's burden, the statutes, as enforced against Appellants, were clearly not the least restrictive means of achieving the goal of protecting the public from forest fires. It is undisputed that the Appellants, through their representative, did in fact apply for a state open fire permit for their ceremonial fires three days before their arrest. It is undisputed that the religious encampment had been visited on more than two prior occasions by both Forest Service and State law enforcement officials and that these officials knew the exact location of the camp, the exact location of the ceremonial fires, and the persons attending the religious fires. On one of those prior occasions three "volunteers" from the Camp were arrested by Appellee for not having fire permits, the Camp members were told to apply for a permit, and they were left with the belief that one would be granted. It is undisputed that the very same Forest Service official who denied the permit application was conducting an at times unattended "controlled" burn of the forest in the immediate area of the encampment.

Thus, Appellee's assertions that Appellants had in essence not applied properly for the open fire permit are patently ludicrous when viewed in context of the full record because the State and Forest Service officials were certainly aware of the exact location, dates, and attendants of the religious fires. The assertion concerning the unfavorable weather conditions was directly contradicted not only by the "controlled burn" but by the Forest Service official's own testimony at trial that he did not remember what the conditions were at the time and could only "guess" at them. The record discloses that each witness that did remember the conditions at the time, remembered that they were unchanged from the date of the application to the date of the arrests and that there was no unusual fire danger present due to the weather. The Forest Service and State officials

personally inspected the religious fires on several occasions both prior to and during the arrests and it was the undisputed testimony of those officials as well as all prosecution and defense witnesses that the fires were in well-constructed, small pits with the debris cleared from around them and that none had escaped or posed any danger of escaping. It was also the undisputed testimony that the fires were constantly attended and devoutly cared for as religious objects crucial to Appellants' traditional ceremonies. The Appellee by its motion and selective recitation of the facts is attempting to retry this matter. The trial court was the fact-finder here, and it and the South Dakota Supreme Court had no difficulty finding that it was proven that the encampment was a non-violent, peaceful Camp having the purpose of attaining spiritual growth and fulfillment according to traditional Lakota religious practices and ceremonies. Although the very same facts cited by Appellee were before those courts, neither found that Appellants had not properly applied for the permit.

The point Appellants are trying to establish here is that the denial of the permit application by the Forest Service official acting under state law was clearly based upon sham, bureaucratic reasons which grew out of the racist attitude of that official and the State officials in charge toward the Indian encampment. The State official who ordered the arrests admitted in his testimony that it was his purpose to shut down and clear the encampment out of his county. Another State official admitted in his testimony that they had not forgotten certain violent confrontations with members of the American Indian Movement years before and that they therefore took special measures, including the enlisting of large numbers of officers from other jurisdictions, during the arrests of Indian persons at Indian gatherings, even though the Appellants and the encampment had never been tied in any way to the American Indian Movement and had at all times been clearly peaceful, religious, and unarmed. The arrests herein were made by a totally inordinate number of

well-equipped officers. Even before making their application for the permit, Appellants testified that one of the officials had told them "jokingly" that killing a deer or a buffalo was on par with killing an Indian. The Forest Service official who denied the application made no attempt to solicit more information because he did not need it and made no attempt to work out conditions which would have allowed the encampment to continue because he and the other state officials did not want to accommodate the encampment in any manner.

In light of the record, Appellee's argument that Appellants are not protected by the First Amendment because they did not properly dot each "i" in the application is absurd. The argument avoids the real issue which is whether the state statute on its face as applied to Appellants is unconstitutional as repugnant to the First Amendment. At trial, the burden was upon the State to prove that this was the least restrictive means of protecting the public from forest fires. The record discloses that the State not only failed to meet this burden, but failed to understand that it had such a burden. The State completely failed to show that it could not have granted the permit upon certain express conditions which would have protected the forests while allowing the Appellants to perform their ceremonies. It is questionable whether the State open fire statute would even allow conditional permits during unfavorable climatic conditions while, notably, the federal open fire regulations expressly allow them. Compare, SDCL 34-35-17 with 36 C.F.R §261.1a.

The State also completely failed to show that it could not have made an exemption to the statute for the pit fires necessary for the performance of Indian religious ceremonies. See, Frank v. State, Alaska, 604 P.2d 1068, 1070 (1979). This would not have been unreasonable in view of the special religious significance these fires have and the historic care which is taken with them by the participants in the ceremonies. Indeed, the trial testimony of the expert on the Lakota people showed that the

moral constraint upon the participant in Lakota religious ceremonies on the negligent use of fire or the allowance of the fire to escape and burn any of the forest is a far greater protection of the public from forest fires under these circumstances than is the State statute. Appellants were not on a picnic, but were engaged in traditional religious ceremonies which had been practiced by their people in these same forests for hundreds of years, long before the open fire statute or State had even come into existence.

Treaty Issue

On the treaty issue, that Appellants are possessed of at least residual rights to the free exercise of their religion on former treaty lands, Appellee asserts in support of its motion that these rights were abrogated by the Act of 1877 and that even if they did exist they were properly subject to regulation by State statute. Like the previous issue, Appellee failed to address the initial issue created by the opinion of the South Dakota Supreme Court -- that jurisdiction on any and all treaty questions lay only with the United States Court of Claims. It is understandable that Appellee chose not to address this issue because the lower court's opinion is so patently at odds with the current state of law concerning jurisdiction over treaty rights. The Appellants were not claiming monetary damages for loss of treaty rights, but were asserting existing treaty rights in defense of their religious activity on treaty lands. This is a fundamental misunderstanding made by the lower court, however, it still stands as the rationale by the highest court in South Dakota for not entertaining treaty rights issues. For this reason, Appellants urge this Court to reverse the lower court and clear up the confusion before the opinion can work further damage on the rights of Indian citizens.

Under the current rule of law, Indian treaty rights remain in existence unless expressly abrogated by Act of Congress. See,

Menominee Tribe v. United States, 391 U.S. 404, 412-13, 88 S.Ct. 705, 20 L.Ed.2d 697, 703 (1968). The Act of 1877, 19 Stat. 254, specifically provided for the ceding of all "territory" and all "hunting" privileges possessed by reason of the Treaty of 1868, 15 Stat. 635. It made absolutely no mention of any other rights other than the right of ownership and the right to hunt on those lands. By its own language, it did not extinguish any other rights of "usage" by the Sioux (Lakota) of those lands which had been guaranteed by the 1868 Treaty. On the contrary, Article 8 of the Act of 1877 specifically provided that the "provisions of said treaty of 1868, except as herein modified, shall continue in full force, and ...each individual shall be protected in his rights of property, person and life." If we were to adopt Appellee's argument that the Act of 1877 was a complete abrogation of the Treaty and extinguished all rights whatsoever thereunder, the last-mentioned provision would be rendered meaningless and become surplusage, in violation of the well-known rule of statutory construction against such interpretations where they can be avoided. Appellee's argument also ignores a line of decisions by this Court, including Menominee Tribe, which hold that certain treaty rights may survive a general abrogation and taking of treaty lands.

The second argument by Appellee, that any residual treaty rights may be regulated by the State, is too simplistic. The Puyallup decision cited by Appellee, held that the activities pursuant to such treaty rights may be regulated by the State, provided the regulation meets appropriate standards and does not qualify these rights. Puyallup Tribe v. Department of Game, 391 U.S. 392, 398, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968). "The appropriate standards requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation." Antoine v. Washington, 420 U.S. 194, 207, 43 L.Ed.2d 129, 139, 95 S.Ct. 944 (1975).

Not only did the enforcement of the statute against the Appellants have the effect of qualifying their treaty right to practice their traditional religious ceremonies on treaty lands, but the State utterly failed at trial to demonstrate that its regulation was a reasonable and necessary measure to protect the forest and that its application to Appellants was neccessary in the interest of such protection of the forest. On the contrary, the record shows through undisputed trial testimony on this issue that the regulation did not need to be applied to Appellants to protect the forest. The fires were sacred to the Lakota persons conducting the ceremonies and an exemption from state regulation is required by treaty law under the Supremacy Clause of the United States Constitution for reasons largely identical to why one is required under the First Amendment under the rationale mentioned in Frank. Only the federal government, not the State, may "qualify" these treaty rights through specific legislation.

It should be noted concerning these First Amendment and treaty arguments, that they are based upon findings: that there is a compelling state interest of the highest order, that this interest cannot be otherwise served, that the enforcement of the statute is the least restrictive means of achieving the interest, that Appellants were a substantial threat to public safety, that the regulation is subject to narrow, objective, and definite standards, and that Appellants cannot be exempted from the application of the regulation. See, Robinson v. Price, 615 F.2d 1097, 1099 (5th Cir. 1980)(summing up the line of United States Supreme Court decisions on this burden); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51, 22 L.Ed.2d 162, 167, 89 S.Ct. 935 (1969); Frank v. State, supra; Antoine v. Washington, supra. In other words, in order for the State to meet its burden to justify regulation of First Amendment and treaty protected rights there must be some proof by the State and findings by the trial court concerning the nature of the State's interests, the urgency

of the regulation (ie, the threat to the forest by Appellants' ceremonial fires), the existence and appropriateness of the regulatory standards, and the reasons why an exemption could not be granted and allow those rights to be exercised. At trial, not only was such proof skimpy to non-existent, but the trial court (as fact-finder because the court denied Appellants a jury) made no such findings whatsoever because it made the unbelievable ruling that it did not have subject matter jurisdiction to hear arguments based on the First Amendment or on the 1868 Treaty and, therefore, never reached the State's burden of proof. Thus, it is premature to even consider these issues without some findings by the trial court on the question of whether or not the State met its burdens of proof on them at trial.

Preemption by Forest Service Regulation

As to the third issue, preemption of the State open fire statute by federal open fire regulations, Appellee argues that the federal statutes which authorized the federal regulations and the Cooperative Fire Control Agreement, 16 U.S.C. §§561a and 561a-1, waive any existing conflict between the federal open fire regulations and the State statute. Appellee does not contest the fact that the federal and state open fire permit procedures and requirements conflict with each other to the extent that in certain circumstances compliance with both may be a physical impossibility or the state statute may stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal open fire regulations. Under the circumstances at bar, this conflict created a situation where the permit restricted by appropriate conditions may well have been issued pursuant to the federal regulation, 36 C.F.R. §§261.1a and 261.5, while it could not have been issued under the restrictions of the State statute, SDCL 34-35-17.

However, it is the position of Appellee, and that of the South Dakota Supreme Court below, that these conflicts and the Supremacy Clause were waived by the §§561a and 561a-1 and the Cooperative Fire Control Agreement. It is somewhat ironic that had the Forest Service official been acting under the regulations controlling his office rather than acting as a State official, the permit might well have been issued and the arrests not occurred.

Yet, §§561a and 561a-1 do not support Appellee's position. Both sections merely authorize the Secretary of Agriculture "to cooperate" with the State and its subdivisions in the enforcement of the state and federal laws regarding the management of the national forest system, and to enter into agreements to that effect which set forth the details for accomplishing this organized system of management. "Cooperate" is not a synonym for waiver of federal regulatory power and jurisdiction. To construe it so would make all federal laws regarding the management of national forests entirely meaningless and surplusage. Nowhere does either law authorize a federal official to become a state official in the management of the forests (especially where there is a choice of which laws to enforce), each only authorizes the Forest Service officials to "cooperate" with State officials in the accomplishment of the State objectives. The obvious intent and purpose of the laws are to enable and encourage federal and state agencies and officials to work together for the efficient management of the forests. These laws never intended that State statutes which were more vague and inflexible than the federal regulations, and which did not accomplish the purposes of those regulations, be substituted for them. Appellants could find nothing in the legislative history of these laws which would suggest otherwise. Obviously, the Congressional intent was to

encourage federal cooperation in the enforcement of state laws to the extent that such cooperation did not conflict with federal laws and regulations.

The last sentence in §561a in this context cannot be construed to be a wholesale waiver of federal sovereignty over the national forest system. Rather, its equally obvious intent was to make clear that the states could still retain general civil and criminal jurisdiction over lands within the system and the federal law was not meant to deprive them of that "general" jurisdiction. This is not to say that where there is a specific conflict between federal regulation and state law that the federal law must give way or that the state law is not subject to the Supremacy Clause. The general rules regarding federal preemption of conflicting state law were in existence at the time these laws were passed, were well understood by both the drafters of the laws and the states, and did not need to be set forth in the statute. A wholesale waiver of federal jurisdiction over the national forest system would not have been made without abundantly clear expressions to that effect.

What was intended by "cooperation" in both statutes is perhaps best understood by the examples enumerated in both sections: reimbursement for expenditures, joint use of pollution abatement equipment, joint manpower and job training programs, joint environmental education, joint timber management and thinning, and the sharing of materials, supplies, facilities, and equipment. Nowhere is it mentioned, or even suggested, that the federal regulations would be waived or not enforced in favor of conflicting state laws on the same matters.

CONCLUSION

For the foregoing reasons, Appellee's Motion to Dismiss or Affirm should be denied in the interest of justice.

Respectfully submitted,

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